No. 87-1118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ROSEMARY BELFIORE, d/b/a NUTMEG NEWS, MURRAY BERMAN, d/b/a BERMAN NEWS SERVICE and MURRAY'S NEWS SERVICE, BROOKWOOD SERVICES CORPORATION, GREENACRES COM NEWS LTD., GROVE NEWS SERVICE, INC., ZIGMUNT POPLASKI, d/b/a Z & J NEWS SERVICE, RICHARD RITTER, d/b/a GREENFIELD HILLS NEWS SERVICE, and ERIC SCOTT, d/b/a NEW CANAAN/SCOTTY'S NEWS SERVICE,

Petitioners,

—v.—

THE NEW YORK TIMES COMPANY and MCI CORPORATION,

Respondents.

REPLY PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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ADDITIONAL FACTS AND ARGUMENT

This reply brief in support of the petition for writ of certiorari is submitted to respond to two issues raised in respondents' brief in opposition. First, defendants claim that, before Kenneth Wallace was appointed special master, plaintiffs were informed off the record of all the material connections between Mr.

Wallace and defense counsel Cahill Gordon & Reindel ("Cahill Gordon") and in particular were informed of his ongoing employment by Cahill Gordon as local counsel in the "*M & R*" case. This contention is false. The timing of the information received by plaintiffs is fully discussed below. Second, defendants argue that plaintiffs enjoyed "mini-monopolies" which were themselves anticompetitive. This reply brief identifies the practical reasons and legal authority for having exclusive territories in the home delivery business.

I. *Undisclosed Interests of the Special Master*

Prior to Mr. Wallace's appointment as special master, plaintiffs knew only that Mr. Wallace had been an associate of Cahill Gordon following his graduation from law school (JA 1438-53, 1553-58). Contrary to defendants' assertions otherwise, plaintiffs were not informed – either formally or informally – of any other connection between Mr. Wallace and Cahill Gordon. Plaintiffs agreed to Mr. Wallace's appointment because they believed that his association with Cahill Gordon was short – comprising no more than 6 or 7 years – and that this association was concluded more than 30 years prior to his appointment as special master (JA1622-24[1]).

Plaintiffs first began to acquire information about Mr. Wallace on May 16, 1984, nearly a year and a half after his appointment. At that time Mr. Wallace informed plaintiffs' counsel that prior to going into private practice he had been general counsel to a client of Cahill Gordon, Bigelow-Sanford (JA1559-60). On October 10, 1984, upon examining a *Who's Who in America* (43rd Ed.) entry for Mr. Wallace, plaintiffs' counsel discovered that, rather than just a few years as they had believed, Mr. Wallace had been associated with Cahill Gordon for 14 years (JA1439).

Soon after learning of Mr. Wallace's extended association, plaintiffs moved on November 14, 1984 for formal disclosure by Mr. Wallace (JA1337, 1343). On November 27, 1984, in papers

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[1] "JA" refers to the Joint Appendix in the Court of Appeals.

submitted in opposition to plaintiffs' motion for disclosure, plaintiffs' counsel was first informed that at the time of his appointment Mr. Wallace was local counsel for Cahill Gordon in a case (later identified as the *M & R* case) (JA1353, 1451). The District Court denied plaintiffs' motion without prejudice to renewal and, to the extent that the motion could be construed as one to disqualify the special master, the application was denied as moot because the District Court expressed its intention to conduct pretrial proceedings without the assistance of the special master (JA1100-02, 1129-30).

On December 17, 1984, plaintiffs moved for an order vacating the appointment of the special master and for recusal of the District Court on the grounds that (1) Mr. Wallace failed to disclose his relationship with Cahill Gordon, (2) despite the District Court's intentions' otherwise Mr. Wallace was continuing to participate in the case (as evidenced by his bills for more than 56 hours of work at a time when he was not supposed to be involved) and (3) Mr. Wallace had had *ex parte* contacts with the District Court concerning the case (JA1355-59). The motion was denied by the District Court on December 18, 1984 (JA1136-37).

In December 1985, Mr. Wallace petitioned the District Court for payment of his outstanding fees withheld by plaintiffs pending disclosure by Mr. Wallace (JA1406). During a hearing on Mr. Wallace's petition on January 22, 1986, Mr. Wallace for the first time identified by name the *M & R* case (JA1478).

Also during the January 22, 1986 hearing, Charles Platto, a partner from Cahill Gordon, claimed that before Mr. Wallace's appointment as special master, Mr. Platto had advised Richard Rindler (a partner from plaintiffs' counsel Pepper Hamilton & Scheetz) that Mr. Wallace was acting as local counsel for Cahill Gordon in the *M & R* case (JA1475-76). Mr. Rindler was not present at the January 22 hearing. Although all other attorneys present for plaintiffs denied knowledge of Mr. Wallace's service as local counsel at the time of the appointment, the District Court relied on Mr. Platto's extemporaneous statement and ordered plaintiffs to pay Mr. Wallace's fees (JA1495-97).

After the January 22 hearing, Mr. Rindler denied having been informed by Mr. Platto or anyone else of Mr. Wallace's service in the *M & R* case and denied defense counsel's additional contention that the subject had been raised in an unrecorded conference with the District Court prior to Mr. Wallace's appointment (*see* JA1441-46, 1553-56, 1619-24). Since, in performance of his duties as special master, Mr. Wallace had contacted the parties in late January 1986 for a conference concerning the summary judgment motion, plaintiffs moved on February 27, 1986 for disclosure by and disqualification of Mr. Wallace (JA1561). This motion was denied as "moot" on December 23, 1986 after the District Court granted defendants' motion for summary judgment (JA1632).

Defendants' brief in opposition is inaccurate in claiming unequivocally that plaintiffs were informed of all material facts at the time of Mr. Wallace's appointment. At the very least there was a heated dispute over this issue on the record, particularly with regard to Mr. Wallace's involvement in the *M & R* case (*see, e.g.*, JA1615-31). Defendants use their unequivocal statement regarding these events to mischaracterize plaintiffs' argument as one merely concerning the technical requirement of record disclosure under 28 U.S.C. §455(e). Plaintiffs' claim has always been that Mr. Wallace did not merely fail to make record disclosure, but that he failed to make any disclosure whatsoever.

Defendants do not deny that until 1986 no disclosure of any kind was made of Mr. Wallace's employment by Cahill Gordon in the *Caspray* case in 1983, approximately 8 months after his appointment as special Master. The contention that defense attorneys were unaware at the time that their partners had hired Mr. Wallace for *Caspray* is irrelevant because Mr. Wallace, who surely was aware of the potential conflict, failed to make any disclosure.

While this Court is not in a position to resolve the factual dispute raised by defendants' contentions that they made informal disclosure, the mere existence of the factual dispute illustrates the importance of the statutory requirements of record disclosure, *see* 28 U.S.C. §455(e), and makes this case worthy of

review by this Court. Even if this Court should determine that record disclosure need not have been made, this case presents the important ethical issue of whether such a factual dispute should have gone unaddressed by the District Court.

II. *Exclusive Territories*

The cooperative distribution system established decades ago by a New York publishers' association created exclusive territories for sound business and pro-competitive reasons. By giving only one dealer the task of delivering all newspapers to a given neighborhood, optimal efficiency was achieved – each publisher benefitted from the savings gained by including the circulation of all other publishers' newspapers in calculating the per paper cost of delivery (JA1705-09, 1775, 2174-75, 2889-91). By reducing the cost of home delivery, publishers were free to compete based on the quality, editorial content and price of their newspapers.

The pro-competitive value of exclusive territories in the home delivery of newspapers was recognized in *Albrecht v. Herald Co.*, 390 U.S. 145, 152-153 (1968), where this Court protected an independent routedealer with an exclusive territory from price fixing by the publisher. After warning the dealer that his prices were too high, the publisher had arranged price competition with the dealer from an outside source. The Court upheld the dealer's market prices reasoning that "[m]aximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay." *Id.* The publisher was held liable for price fixing. *Id.* at 154.

Similarly, in *Newberry v. Washington Post Co.*, the court found that a vertical allocation of exclusive newspaper delivery territories was not only legal but that it furthered "a legitimate marketing objective: to accomplish maximum market penetration and prompt, efficient, undisrupted delivery to home subscribers. Given the 'facts peculiar to the [newspaper] business,'

the system adopted was reasonably necessary to achieve this objective." 438 F.Supp. 470, 475, 476 n.8 (D.D.C. 1977) (citing *Albrecht v. Herald* and *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)).

Thus the mere fact that plaintiffs operate in exclusive territories does not undermine their antitrust claims and does not alter the appropriateness of this case for review of the guidelines set forth in this Court's recent summary judgment decisions.

CONCLUSION

While plaintiffs deny that they were in any manner informed of the material connections between the special master and defense counsel, defendants' contentions that plaintiffs were informed off the record creates a factual issue which highlights the importance of requiring record disclosure or resolution of the factual dispute. The absence of either by the District Court and Court of Appeals creates a decision which flies in the face of all prior precedent, which will adversely affect the federal judicial system, and which therefore warrants a grant of certiorari in this case.

Certiorari should also be granted because the existence of exclusive territories does not change the appropriateness of this case for illustration of the guidelines set forth in this Court's recent summary judgment decisions.

Respectfully Submitted,

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